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CASE NO. 84-1917

In The Supreme Court of the United States

OCTOBER TERM, 1984

FRANK L. JOHNS,

Petitioner,

v.

THE SUPREME COURT OF OHIO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Does the Eleventh Amendment to the United States Constitution prohibit the federal judiciary from ordering state officials to conform their behavior to state law?

2. Does the Eleventh Amendment to the United States Constitution prohibit the federal judiciary from exercising its jurisdiction in suits where retroactive damages are sought from a state?

3. Does a United States district court have jurisdiction to review as if on appeal a decision rendered by a state's highest court?

PARTIES

Pursuant to Rule 34.1(b), Rules of the Supreme Court, all parties to this action are listed in the caption of the case.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 753 F.2d 524 (6th Cir. 1985) and is reproduced in the Petition for Certiorari at page A1. The opinion of the United States District Court for the Southern District of Ohio, Eastern Division, is unreported and is reproduced in the Petition for Certiorari at page A13.

JURISDICTION

The decision of the United States District Court for the Southern District of Ohio, Eastern Division, noted above, was entered on April 18, 1983. The decision of the United States Court of Appeals for the Sixth Circuit, noted above, was entered on January 30, 1985. Jurisdiction is alleged pursuant to 28 U.S.C. Section 1254(1) and the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The case involves Section 1 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

> any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A concise description of the instant case is contained in the Sixth Circuit Court of Appeals' decision:

> The history of this litigation begins with the arrest of Frank L. Johns in 1964 for selling marijuana. Following his arrest, Johns was convicted of criminal charges and sentenced to 30 to 60 years of imprisonment. After serving six and one-half years of this term, this court granted Johns' petition for a writ of habeas corpus. *Johns v. Perini,* 462 F.2d 1308 (6th Cir.), *cert. denied,* 409 U.S. 1049, (1972). The petition was granted on the grounds that Johns had been denied effective assistance of counsel. *Id.* The State of Ohio did not retry Johns.
>
> Johns believed that he had been unlawfully imprisoned and sought to recover damages for his imprisonment from the State of Ohio. The 112th General Assembly of Ohio passed Substitute Senate Bill No. 221, effective November 23, 1977, granting Johns permission to file a claim against the state. Section 41 of that bill provides:

> Section 41. Notwithstanding the provisions of Chapter 2743 of the Revised Code, Mr. Frank Johns, 12705 Craven Avenue, Cleveland, Ohio 44105, is hereby authorized to file a claim for damages in the Court of Claims for unlawful incarceration and for lost wages, legal expenses, and general damages resulting from his alleged unlawful incarceration. The Court of Claims, after all the evidence in support of this claim has been heard, shall determine: (1) whether the preponderance of the evidence offered supports a finding that Mr. Johns had been unlawfully incarcerated by the State of Ohio, and if this is so (2) the dollar amount of damages to be awarded as compensation. Funds shall be available from the balance in the reparations Rotary Fund to pay any awards for damages made to Mr. Johns by the Court of Claims. Such claim for damages must be filed prior to July 1, 1979, after which date the authority to file such claim shall expire.

Johns then filed a claim against the state in the Ohio Court of Claims. His action was dismissed twice in the Court of Claims. Both times the Ohio Court of Appeals ordered that the claim be rein-

stated. Eventually, the Court of Claims denied Johns' claim for relief, and the court's decision was upheld by the Ohio Supreme Court. *Johns v. State,* 67 Ohio St.2d 325, 423 N.E.2d 863 (1981), *cert denied,* 455 U.S. 944 (1982).

Johns then brought suit under 42 U.S.C. Section 1983 in the United States District Court for the Southern District of Ohio. In his complaint Johns requested that

> the judgment of the Supreme Court of Ohio. . .be vacated and that the Defendant be ordered and directed to rehear the case and to determine the issues before it solely in accordance with established applicable principles of Ohio law, including the statute enacted by the General Assembly of Ohio constituting the basis of the litigation before it and the rights and benefits asserted by the Plaintiff.

Johns v. The Supreme Court of Ohio, 753 F.2d 524, 525-26 (6th Cir. 1985).

United States District Judge Robert M. Duncan dismissed Petitioner's suit finding that a federal court lacked jurisdiction to hear the case. *Johns v. The Supreme Court of Ohio,* No. C-2-82-1581 (S.D. Ohio, Apr. 18, 1983). His decision was affirmed by the United

States Court of Appeals for the Sixth Circuit. *Johns,* 753 F.2d at 524. This case is now before this Court on a Petition for writ of certiorari.

SUMMARY OF ARGUMENT

1. Neither the Constitution nor laws of the United States grant Petitioner a right to review on a writ of certiorari. This Court traditionally has demanded a demonstration of the existence of unresolved federal questions of sufficient scope and impact to justify an exercise of its discretionary jurisdiction. *Rice v. Sioux City Memorial Park Cemetery, Inc.,* 349 U.S. 70 (1955).

Petitioner's suit, which seeks nothing more than federal court review of a state court interpretation of state law, is bereft of federal issues. Even if federal issues were present, this action is so unusual and episodic in nature that review by this Court would not result in resolution of important questions of federal law.

2. Petitioner's suit is an expression of his dissatisfaction with Respondent's interpretation of Ohio law. In seeking reversal, Petitioner invites this Court to depart from its prior interpretations of the Eleventh Amendment to the United States Constitution: federal courts may not order state officials to conform their conduct to state law, *Pennhurst State School & Hospital v. Halderman,* _____U.S._____ , 104 S. Ct. 900 (1984); retroactive relief against a state may not be obtained in federal court, *Edelman v. Jordan,* 451 U.S. 651 (1974); and whether or not named, the state is the real party in interest when money from the public treasury will be utilized to satisfy an award of damages, *Dugan v. Rank,* 372 U.S. 609 (1963).

3. Pursuant to 28 U.S.C. Section 1257, only this Court has jurisdiction to review a decision rendered by a state's highest court. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983). As a result, the courts below correctly concluded that the district court had no authority to hear Petitioner's case.

Even in the absence of 28 U.S.C. Section 1257, because Petitioner's cause is tantamount to an action in mandamus, federal law would still prevent any exercise of the district court's jurisdiction in this matter. *See* 28 U.S.C. Section 1361; *Haggard v. State of Tennessee,* 421 F.2d 1384 (6th Cir. 1970).

In any event, Petitioner attempts to relitigate issues he raised, or could have raised, in an earlier case. Therefore, this action is barred by the doctrine of *res judicata.*

ARGUMENT

I

NEITHER THE CONSTITUTION NOR LAWS OF THE UNITED STATES VESTS IN PETITIONER ANY RIGHT TO HAVE HIS SUIT REVIEWED ON WRIT OF CERTIORARI.

Whether to grant review on a writ of certiorari is solely within the discretion of this Court. Sup. Ct. R. 17. Before a writ of certiorari will issue, Petitioner must demonstrate to the satisfaction of this Court that his case presents "special and important reasons" deserving attention. *Id.* These reasons go "beyond the. . .episodic."

Rice v. Sioux City Memorial Park Cemetery, Inc., 349 U.S. 70, 74 (1955). They must involve "principles the settlement of which is of importance to the public, as distinguished from that of the parties," or must arise in the context of a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals," *Layne & Bowler Corp. v. Western Wells Works, Inc.*, 261 U.S. 387, 393 (1923) (*quoted in Rice*, 349 U.S. at 619-20), or between state courts of last resort. Sup. Ct. R. 17.

Viewing this test from the perspective of the instant controversy, Petitioner could not find himself on shakier ground. First, the test for issuance of a writ of certiorari presupposes issues of federal concern. In summarizing the posture of this case, the Court of Appeals for the Sixth Circuit noted that Petitioner

> alleges no violation of any specific federal constitutional rights other than in the most conclusory terms; his disagreement [with Respondent] stems from his unhappiness with the manner in which the Ohio courts construed the Ohio legislature's limited waiver of sovereign immunity in section 41 of [Ohio] Substitute Senate Bill No. 221.

Johns v. The Supreme Court of Ohio, 753 F.2d 524, 526 (6th Cir. 1985).

Even assuming, *arguendo*, that a misapplication of state law occurred during Petitioner's protracted journey through the Ohio court system, the Equal Protection Clause of the Fourteenth Amendment does not guarantee

freedom from judicial error. *Beck v. Washington,* 369 U.S. 541, 554-55 (1962). Nor may a federal court substitute its own judgment, on an allegedly erroneous interpretation of state law by a state court, and then treat its determination that error occurred as conclusively demonstrating there was a violation of the Due Process Clause in the state court proceeding. *Gryger v. Burke,* 334 U.S. 729, 731 (1948).

Second, Petitioner's cause of action is as individualistic as any accusation of false imprisonment. His alleged injury results from Respondent's interpretation of one piece of state legislation designed especially for Petitioner and intended to have but a single application. Such circumstances are almost synonomous with "episodic."

Third, Petitioner cannot identify any benefit which will flow to the public as a result of continued litigation in this matter. The idiosyncratic nature of this case will make any decision on the merits rendered by this Court capable of producing few, if any, consequences for future litigants. With the exception of Petitioner's already adjudicated claim, no legal right is at issue.

Finally, Petitioner can hardly argue that *any* juristic conflict will be resolved should his request for review be granted. In short, Petitioner's case satisfies none of the criteria established for distinguishing meritorious from meritless petitions for writs of certiorari.

II

THE GRANTING OF A WRIT OF CERTIORARI IS INAPPROPRIATE WHERE THIS COURT'S PRIOR DECISIONS HAVE DEALT EXTENSIVELY AND CONCLUSIVELY WITH THE ISSUES RAISED BY PETITIONER.

A. THIS COURT'S DECISION IN *PENNHURST STATE SCHOOL & HOSPITAL V. HALDERMAN* MANDATES REJECTION IN THIS CASE OF THE PETITION FOR REVIEW BY WRIT OF CERTIORARI.

Petitioner seeks to portray his cause as one appropriate for federal intervention. As the Court of Appeals for the Sixth Circuit concluded, however, Petitioner calls on the federal courts to ignore firmly settled constitutional doctrine: the Eleventh Amendment prohibits the federal judiciary from commanding state officials to conduct themselves in conformance with state law "when the relief sought and ordered has an impact directly on the state itself." *Pennhurst State School & Hospital v. Halderman,* _____U.S._____ , 104 S. Ct. 900, 917 (1984). This admonition holds true even when suit is initiated by a citizen of the defendant state. *Edelman v. Jordan,* 415 U.S. 651 (1974).

The state is the real party in interest and the direct target of suit if "the judgment would expend itself on the public treasury. . .or compel [the state] to act." *Pennhurst,* 104 S. Ct. at 908 n.11 (quoting *Dugan v. Rank,* 327 U.S. 609, 620 (1963)). A state's highest

court is an integral part of the state and thereby shielded by the Eleventh Amendment barrier to suit in federal court. *See, e.g., N.A.A.C.P. v. State of California,* 511 F. Supp. 1244, 1257 (E.D. Calif. 1981); *St. Louis v. Supreme Court of Nevada,* 490 F. Supp. 1174, 1180 (D. Nev. 1980); *cf. Ginter v. State Bar of Nevada,* 625 F.2d 829, 830 (9th Cir. 1980).

Here, Petitioner requests this tribunal to contradict the Ohio Supreme Court's interpretation of Ohio law and compel Respondent to award damages for past injuries allegedly suffered by Petitioner at the hands of the State of Ohio. Because Petitioner has not sought, and is barred by judicial immunity from seeking, damages from any judges of the Ohio Supreme Court in their individual capacities, *see Stump v. Sparkman,* 435 U.S. 349 (1978), the only source of recovery must be the state's treasury. This would give rise to a judgment of retroactive relief directly against the state, the exact scenario the Eleventh Amendment was designed to prevent. *Edelman,* 415 U.S. at 664-70.

Of course, sovereign immunity may be waived, *Pennhurst,* 104 S. Ct. at 907; and Ohio Substitute Senate Bill No. 221 did contain a waiver to the extent that Petitioner was permitted to sue in Ohio's Court of Claims. Nevertheless, "a State's waiver of sovereign immunity in its own courts is not a waiver of Eleventh Amendment immunity in the federal courts." *Pennhurst,* 104 S. Ct. at 907 n.9. Unless the State's waiver explicitly includes consent to suit in federal court, the Eleventh Amendment forbids the exercise of federal jurisdiction. *Pennhurst,* 104 S. Ct. at 907. Clearly, none of the language in Substitute Senate Bill No. 221 remotely resembles a surrender of the State of Ohio's Eleventh Amendment immunity.

B. A FEDERAL DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION TO REVIEW A DECISION OF THE OHIO SUPREME COURT.

From its inception, Petitioner's suit has been a thinly veiled attempt to attack collaterally in the federal arena the finality of a state court proceeding. Yet, it is well established that the jurisdiction of a federal district court is strictly original; it is without jurisdiction to review, let alone reverse or modify, the judicial determination of a state's highest court.[1] *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482-86 (1983). This applies in spite of allegations that "the state court's action was unconstitutional." *Id.* Review of state court proceedings is reserved to this Court. *Id., see also* 28 U.S.C. Section 1257, and Petitioner has already exhausted his opportunity to present his arguments regarding Respondent's handling of his case. *See Johns v. State,* 67 Ohio St. 2d 325, 423 N.E.2d 863 (1981), *cert. denied,* 455 U.S. 944 (1982). Petitioner's invention of specious federal issues cannot resuscitate long-resolved questions of law. He is not entitled to a *second* federal review of state court action because he is disappointed by this Court's response to his first petition for a writ of certiorari.

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[1] Federal courts are bound to observe interpretations of state law rendered by a state's highest court. *See, e.g., Schad v. Borough of Mt. Ephraim,* 452 U.S. 61, 65 (1981); *Hortonville Junction School District v. Hortonville Education Association,* 426 U.S. 482, 488 (1976).

C. A FEDERAL DISTRICT COURT MAY NOT GRANT THE SORT OF RELIEF REQUESTED.

Even if the district court otherwise had jurisdiction over this claim, it would lack authority to grant the requested relief. Petitioner is asking this Court to direct the Supreme Court of Ohio to vacate its final judgment and rehear a case. Such a claim for relief is, in essence, one for a writ of mandamus.

Congress, in 28 U.S.C. Section 1361, has granted district courts jurisdiction over mandamus actions but that grant of jurisdiction is limited to actions against federal officers or employees:

> [t] he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Neither Section 1361 nor any other statute confers jurisdiction on a federal court over such actions against a state court. "In any event, Federal Courts have no authority to issue writs of mandamus to direct state courts or their judicial officers in the performance of their duties." *Haggard v. State of Tennessee,* 421 F.2d 1384, 1386 (6th Cir. 1970). *See also Lamar v. 118th Judicial District of Texas,* 440 F.2d 383, 384 (5th Cir. 1971); *Clark v. State of Washington,* 366 F.2d 678, 681 (9th Cir. 1966).

D. THIS ACTION IS BARRED BY THE DOCTRINE OF *RES JUDICATA.*

According to the doctrine of *res judicata,* a litigant is barred from "relitigating issues that were or could have been raised" in an earlier case. *Federated Department Stores v. Moitie,* 452 U.S. 394, 398 (1981); *see also Migra v. Warren City School District Board of Education,* _____U.S._____, 104 S. Ct. 892, 894 (1984). *Res judicata* applies in federal court to bar relitigation of matters adjudicated in state court, and the doctrine is fully applicable even to actions under 42 U.S.C. Section 1983. *Allen v. McCurry,* 449 U.S. 90, 103-04 (1980). Petitioner does not avoid the doctrine by suing, in the second action, the tribunal that rendered the earlier decision. *See, e.g., Coogan v. Cincinnati Bar Association,* 431 F.2d 1209 (6th Cir. 1970); and *Castorr v. Brundage,* 674 F.2d 531 (6th Cir. 1982) (court invoked *res judicata* to dismiss suits against state judges that challenged a state court decision). Petitioner must not be permitted to circumvent the doctrine of *res judicata* under the pretense that this is a new suit predicated on original questions of law or fact. He had ample opportunity in his initial application for a writ of certiorari to raise issues of federal constitutional violations allegedly perpetrated by Respondent. He chose not to present them at that time. As a result, any right to review he may have had, has been exhausted.

CONCLUSION

WHEREFORE, for the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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